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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-2004 GAF (FFMx)	Date	June 20, 2014
Title	JP Hyan v. Liberty Surplus Insurance Corporation et al		

Present: The Honorable	**GARY ALLEN FEESS**	
Stephen Montes Kerr	None	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:	
None	None	

Proceedings: **(In Chambers)**

ORDER RE: ANTI-SLAPP MOTION & MOTIONS TO DISMISS

I. INTRODUCTION

J.P. Hyan ("Hyan"), a former client of the now defunct law firm of Rutter Hobbs & Davidoff ("RHD"), obtained a malpractice judgment against the firm in a Superior Court lawsuit. Post-judgment negotiations led to a $7.5 million settlement agreement which was to be paid in large part by the firm's malpractice carriers. The firm promised to use its best efforts to persuade the carriers to pay Hyan even though it would have largely depleted funds available for any other lawsuits that were brought against other firm attorneys. It so happened that other such cases were pending at the time against other lawyers in the firm, notably Eric Peterson ("Peterson") and Rosslyn (Beth) Hummer ("Hummer"), arising out of their activities on behalf of firm clients. Peterson and Hummer demanded that the carriers defend and indemnify them. In the face of these multiple demands, the excess carrier, Executive Risk Specialty Insurance Company ("ERSIC"), brought an interpleader action in this Court asking the Court to sort out the competing claims to the insurance proceeds. That action has been stayed while the active state cases against Peterson and Hummer are resolved.

Hyan, naturally, wants his money and sought, without success, to intervene in the interpleader action. He therefore filed his own suit in state court launching an attack on everyone involved except ERSIC. (Docket No. 16 [First Am. Compl. ("FAC")].) Accordingly to Hyan, RHD allegedly breached its settlement agreement—both by failing to obtain money from its insurers and by failing to pay its share of the settlement. RHD's primary malpractice carrier, Liberty Surplus Insurance Corporation ("Liberty"), allegedly induced RHD to not seek

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coverage from Liberty, causing RHD to breach the settlement agreement. Additionally, Plaintiff claims to have a direct right of action against Liberty for collection on RHD's insurance policy. Finally, Hyan alleges that Hummer and Peterson's demands under the policies amount to an inducement to breach the settlement agreement because the total amount of funds available under the policies may be insufficient to meet all demands that have been made against the policies. Several motions related to these allegations are now before the Court.

Liberty has filed a motion to dismiss, maintaining that Plaintiff has no direct right of action against it. (Docket No. 24 [Liberty Mot. to Dismiss ("Liberty Mem.")].) Because Plaintiff has not specified any bodily injury, death, or property damage, this argument must be sustained. Moreover, there are no allegations in the FAC to indicate that Liberty induced RHD to breach its settlement obligations. Liberty's motion must therefore be **GRANTED**.

Hummer has filed an anti-SLAPP motion, indicating that the suit against her arises out of protected speech. (Docket No. 22 [Anti-SLAPP Mot. to Strike ("SLAPP Mem.")].) Specifically, she claims that she became involved in Hyan's dispute only because she sought insurance coverage for litigation costs incurred in connection with two otherwise unrelated lawsuits. The Court agrees that this conduct is protected by California's anti-SLAPP statute, and **GRANTS** the motion. The remaining motion—a motion to dismiss, also filed by Hummer—need not be addressed by the Court. (See Docket No. 23 [Hummer Mot. to Dismiss ("Hummer Mem.")].) Because the anti-SLAPP motion has been granted, the remaining motion to dismiss is **DENIED as moot**.

The Court sets forth its reasoning, in greater detail, below.

II.
BACKGROUND

A. THE INITIAL ACTION: HYAN V. RHD

In January 2010, Plaintiff JP Hyan filed a lawsuit against RHD—his former lawyers—alleging that they had committed malpractice. (FAC ¶¶ 11, 41.) The case was brought in Los Angeles County Superior Court, and eventually went to trial. (Id. ¶ 16.)

During the trial, Hyan offered to settle his claims in exchange for $8 million. (Id. ¶ 17.) RHD had two insurance policies that could have been used to satisfy this demand: a $5 million primary policy issued by Liberty, and a $5 million excess policy issued by ERSIC. (Id. ¶¶ 13, 14.) RHD would have accepted the $8 million settlement, but two of its employees intervened.

(Id. ¶ 17.) Hummer and Peterson—the two employees—were then being sued in multiple unrelated cases, and were attempting to obtain malpractice coverage for themselves. (Id. ¶ 28.) The $8 million proposal was ultimately rejected, and the jury returned a verdict in Hyan's favor for $10,155,559. (Id. ¶ 20.)

Following the jury verdict, Plaintiff and RHD restarted settlement negotiations. They eventually agreed to a $7.5 million entry of judgment against RHD. (Id. ¶ 22.) Plaintiff and RHD also agreed that $5,250,000 of the total would be satisfied with the Liberty and/or ERSIC policies. (Id.) To this end, RHD was obligated to use its "best efforts" to obtain coverage under the Liberty and ERSIC policies. (Id.) This agreement resolved all claims made by Plaintiff, including a number that had been severed for arbitration proceedings. (Id. ¶ 23.)

B. The Non-Party Action: Hummer and Peterson

As mentioned above, Hummer and Peterson were separately sued by several non-Parties. (Id. ¶ 28.) Two such cases are specified in the FAC. In the first, it was alleged that Hummer and Peterson stole an array of personal property—weapons, jewelry, and cash—while carrying out an eviction. (Id.) In the second action, it was alleged that they engaged in malicious prosecution. (Id.)

Because each of these suits had a connection to actions they took as lawyers for RHD, Hummer and Peterson have both made claims on RHD's insurance policies. (Id. ¶¶ 103, 104.)

C. The Satisfaction

Though judgment was entered in March 2012, pursuant to the terms of Plaintiff's settlement agreement with RHD, none of the $7.5 million owed to Hyan has yet been paid. (Id. ¶ 27.)

RHD had a total insurance coverage of $10 million. (Id. ¶¶ 13–14.) Accordingly, paying Hyan's settlement amount would have substantially exhausted the available coverage. Hummer and Peterson—who were facing malpractice suits in their individual capacities—were loath to see this happen, and therefore "object[ed] to releasing funds to . . . Hyan." (Id. ¶ 28.) Based on this objection, Liberty has refused to pay anything to Plaintiff. (Id. ¶ 103.)

Plaintiff alleges that, in spite of their objections, Hummer and Peterson do not have rightful claims to the Liberty policy. (Id. ¶ 29.) As he points out, the policy does not cover claims for conversion or malicious prosecution—the principal causes of action in the underlying cases against Hummer and Peterson. (Id.)

D. The ERSIC Action

The current complaint conspicuously fails to name ERSIC as a Defendant. This is likely because—when it became clear that multiple claims would be made on its policy, and that the policy might be insufficient to cover all claims—ERSIC filed its own action before this Court. (Id. ¶ 18; see Executive Risk Specialty Insurance Company v. Rutter Hobbs and Davidoff, Inc. et al., C.D. Cal. No. CV 11-4828 GAF (FFMx).)

ERSIC indicated in that action that it would be happy to pay Hyan "the full policy amount of $5,000,000," but that Hummer and Peterson had objected. (FAC ¶ 19.) In light of the multiple claims, ERSIC was uncertain who should receive the proceeds, and therefore deposited its policy with the Court. (C.D. Cal. No. CV 11-4828, Docket No. 67 [Not. of Deposit].) RHD eventually asked the Court to direct payment of the ERSIC policy to Plaintiff; that request was denied. (Id. ¶ 32.)

Hummer and Peterson then filed motions to stay the ERSIC action until the claims pending against them were resolved. (Id. ¶ 33.) RHD did not oppose the stay, the motion was granted, and RHD did not appeal. (Id. ¶¶ 34, 35.) RHD has taken no further action to satisfy Plaintiff's judgment. (Id. ¶ 37.)

III.
DISCUSSION

A. Legal Standards

1. Motion to Dismiss

A complaint may be dismissed if it fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept as true all factual allegations pleaded in the complaint, and construe them "in the light most favorable to the nonmoving party." Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996); see also Stoner v. Santa Clara Cnty. Office of Educ., 502 F.3d 1116, 1120–21 (9th Cir. 2007). Dismissal under Rule 12(b)(6) may be based on either (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996) (citing Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)).

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Under Rule 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has interpreted this rule to allow a complaint to survive a motion to dismiss only if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has not sufficiently established that the pleader is entitled to relief. Id. at 679.

A complaint generally need not contain detailed factual allegations, but "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citation, alteration, and internal quotations omitted). Similarly, a court need not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). That is, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Iqbal, 556 U.S. at 678-79; see also Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

As a general rule, a court should freely give leave to amend a complaint that has been dismissed. Fed. R. Civ. P. 15(a). A court may deny leave to amend when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. Co. v. ServWell Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); Roque v. Wells Fargo Bank N.A., 2014 WL 904191 (C.D. Cal. Feb. 3, 2014).

2. ANTI-SLAPP MOTION TO STRIKE

California's anti-SLAPP statute, codified at Section 425.16 of the California Code of Civil Procedure, was borne out of the Legislature's finding that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Civ. Proc. Code § 425.16(a). In light of that finding, the statute provides that:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United

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> States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Civ. Proc. Code § 425.16(b)(1).

The statute thus has two components. First, the plaintiff's cause of action must "arise from" an act of the defendant which was in furtherance of the defendant's right of petition or free speech. In this first step, the defendant bringing the anti-SLAPP motion "has the burden of making a prima facie showing" that the lawsuit arises from a protected activity under the statute. Dixon v. Superior Court, 36 Cal. Rptr. 2d 687, 694 (Cal. Ct. App. 1994) (internal citation omitted). If the defendant does so successfully, the burden shifts to the plaintiff to demonstrate that he will probably prevail on the claim at trial. Evans v. Unkow, 45 Cal. Rptr. 2d 624, 627–28 (Cal. Ct. App. 1995).

In evaluating the first prong, "the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." City of Cotati v. Cashman, 52 P.3d 695, 701 (Cal. 2002) (original emphasis). "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)." Id. at 701–02. Those categories are:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Cal. Civ. Proc. Code § 425.16(e).

If a defendant shows that one of these four categories applies, the court undertakes a further inquiry, evaluating whether the plaintiff has demonstrated that he will probably prevail on the claim at trial. Evans, 45 Cal. Rptr. 2d at 627–28. For the second step, "in order to establish the requisite probability of prevailing, the plaintiff need only have stated and

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substantiated a legally sufficient claim." Navellier v. Sletten, 29 Cal. 4th 82, 88 (2002) (citations and quotation marks omitted).

California's "anti-SLAPP statute was enacted to allow for early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001). "Thus, a defendant's rights under the anti-SLAPP statute are in the nature of immunity: [t]hey protect the defendant from the burdens of trial, not merely from ultimate judgments of liability." Batzel v. Smith, 333 F.3d 1018, 1025 (9th Cir. 2003). "Because California law recognizes the protection of the anti-SLAPP statute as a *substantive* immunity from suit," a federal court sitting in diversity must do so as well. Id. (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).

B. APPLICATION

Two Defendants have now filed motions for the Court's consideration. Liberty moves to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6). Hummer likewise moves to dismiss, but also includes a motion to strike Plaintiff's complaint as a SLAPP action. The Court addresses the Defendants' concerns, in turn, below.

1. LIBERTY'S MOTION TO DISMISS

Hyan brings two classes of claims against Liberty. The first depends upon a finding that he can pursue Liberty directly for failure to comply with its obligation under the insurance policy it issued to RHD. The second depends on allegations that Liberty induced RHD to breach its settlement agreement. The Court addresses each, in turn, below.

a. Plaintiff's Direct Action Theory

Plaintiff Hyan was not a party to the insurance agreement between Liberty and RHD. (FAC at Ex. B [Liberty Policy].) His claims against Liberty are therefore brought primarily as a judgment creditor's direct action against an insurer, pursuant to Section 11580 of the California Insurance Code. (FAC ¶ 46.) This Section describes the limited circumstances in which a non-insured party may seek recovery from an insurer based solely on provisions of the insurance policy. Compare Royal Indem. Co. v. United Enters., Inc., 162 Cal. App. 4th 194, 205 (2008) ("a third party who is not in privity of contract with the liability insurer (nor named as an express beneficiary of the policy) . . . would normally lack standing to sue the insurer to resolve coverage questions").

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"[A] third party claimant bringing a direct action against an insurer should . . . plead and prove 1) it obtained a judgment for bodily injury, death, or property damage, 2) the judgment was against a person insured under a policy that insures against loss or damage resulting from liability for personal injury or insures against loss of or damage to property caused by a vehicle or draught animal, 3) the liability insurance policy was issued by the defendant insurer, 4) the policy covers the relief awarded in the judgment, 5) the policy either contains a clause that authorizes the claimant to bring an action directly against the insurer or the policy was issued or delivered in California and insures against loss or damage resulting from liability for personal injury or insures against loss of or damage to property caused by a vehicle or draught animal." Wright v. Fireman's Fund Ins. Cos., 11 Cal. App. 4th 998, 1015 (1992) (citing Cal. Ins. Code § 11580).

Here, the Parties agree that the crucial element of a Section 11580 inquiry is whether Plaintiff obtained a judgment for bodily injury, death, or property damage. (Liberty Mem. at 7–8; Docket No. 28 [Opp. to Liberty Mot. to Dismiss ("Liberty Opp.")] at 5.) Plaintiff believes that his $7.5 million judgment covered both bodily injury and property damage; Liberty believes that it included neither. (Liberty Opp. at 5, 9; Liberty Mem. at 6, 9–10.)

1. Potential Property Damage

Hyan includes only one allegation of property damage. Specifically, he maintains that the $7.5 million judgment covered an economic injury: his primary claim against RHD related to money-damages resulting from a poorly drafted contract.[1] (Liberty Opp. at 5–9.) His theory finds no support in California case law, which does not include economic injury—lost money—in their definition of Section 11580's "property damage." For example, a sixth appellate district decision held that a judgment based on wrongful diversion of funds "patently was not 'based upon bodily injury, death, or property damage' within the meaning of" Section 11580. Xebec Dev. Partners, Ltd. v. Nat'l Union Fire Ins. Co., 12 Cal. App. 4th 501, 527

[1] Liberty suggests in its motion to dismiss that Hyan may also claim damages resulting from the forced sale of two pieces of real property. (Liberty Mem. at 9.) However, Plaintiff does not mention this theory in his opposition, and the FAC only references "real property" in passing, without specifying what this property was. (FAC ¶ 47.) Looking more closely, it appears that the use of this phrase is a holdover from Plaintiff's original complaint, in which he relied upon a "forced sale" theory to support his claims against Liberty. (See Docket No. 1 [Not. of Removal] at Ex. A [Compl.] ¶ 27) (describing "loss of [Plaintiff's] homes" as sufficient justification for a direct action.) Because Plaintiff does not mention the real property in his opposition, and because the FAC is similarly silent, the Court assumes that he has abandoned this allegation.

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(1993).[2] In another, the fourth district found that "strictly economic losses . . . do not constitute damage or injury to tangible property covered by a comprehensive general liability policy." Giddings v. Indus. Indem. Co., 112 Cal. App. 3d 213, 219 (1980).[3] And in a more thoroughly reasoned opinion, at least one federal court has explained that losing money as a result of securities fraud does not "constitute[] property damage." GDF Int'l v. Associated Elec. & Gas Ins. Servs., 2003 U.S. Dist. LEXIS 3338, at *10 (N.D. Cal. Mar. 3, 2003).

These decisions are entirely consistent with the language of the policy, which defines property damage as "injury to or destruction of any *tangible property* or loss of the use resulting therefrom." (Liberty Policy at 5) (emphasis added.) It continues: "[t]angible property does not include currency and negotiable instruments." (Id.) Nothing in these words and phrases even hints at economic loss.

"In construing the language of an insurance policy, a court should give the words used their plain and ordinary meaning, unless the policy clearly indicates to the contrary." Giddings, 112 Cal. App. 3d at 218. And "[u]nderstood in its plain and ordinary sense, 'tangible property' means 'property (as real estate) having physical substance apparent to the senses.'" Id. at 219 (citation omitted). Under Giddings, "constru[ing] the explicit words 'tangible property' to include intangible economic interests and property rights requires a strained and farfetched interpretation, doing violence to the plain language of the policies. Such an interpretation would rewrite the policies to fasten on the insurers a liability they have not assumed." Id.

In Giddings, as here, the insurance policy covered liability for property damage, which was defined in the policy as "loss of or direct damage to or destruction of tangible property." Id. at 217. The court noted that "strictly economic losses like lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible property . . . ." Id. Similarly, the California Supreme Court has determined that

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[2] Plaintiff suggests that Xebec has since been overruled. (Liberty Opp. at 6.) However, this argument suffers two difficulties. First, the purportedly "overruling" case was not decided by the California Supreme Court but rather by another intermediate appellate court. People ex rel. City of Willits v. Certain Underwriters at Lloyd's of London, 97 Cal. App. 4th 1125 (2002). Even so, had City of Willits addressed the issue now before this Court, it would require the Court's consideration. However, City of Willits does not address the economic/property damages distinction. Instead, it addresses the narrow question of whether Section 11580 applies when the property damage was not "caused by a vehicle or draught animal." Id. at 1131. It therefore provides no support for Plaintiffs primary argument or for his contention that it somehow "overruled" Xebec.

[3] Giddings dealt with comprehensive general liability policies. The Liberty policy was of a more limited type, so it is reasonable to assume that the restraint imposed there would be applicable here.

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"[t]he focus of coverage" for damage to tangible property is "the property itself, and does not include intangible economic losses." Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1, 17 (1995).

Accordingly, Plaintiff's economic loss does not constitute property damage.

2. Potential Bodily Injury

Plaintiff's bodily injury argument can be dealt with more briefly. As he frames it, the $7.5 million settlement included claims against RHD for emotional distress. (Liberty Opp. at 10.) He did indeed bring claims for emotional distress. However, these were dismissed with prejudice months prior to the settlement. (Docket No. 25-1 [Appl. for Dismissal] at 1.)[4]

The current action arises out of a final judgment. (FAC ¶ 1.) And a court judgment in favor of a plaintiff must be based on active claims, rather than causes of action long since dismissed with prejudice. That is, a court cannot enter judgment on matters no longer before it. See Tronslin v. Sonora, 144 Cal. App. 2d 735, 738 (1956) ("every judgment must be construed with relation to the particular matter before the court for adjudication"); Estate of Gilmaker, 226 Cal. App. 2d 658, 661 (1964) ("an order must be construed with relation to the particular matter before the court for adjudication").

Because they were dismissed prior to final judgment, that judgment could not have been based on Plaintiff's initial claims of emotional distress. Accordingly, the causes of action now brought against Liberty cannot find a basis in emotional distress, so they have no connection to any conceivable bodily injury.

3. The Fate of Plaintiff's Direct Action

Plaintiff has not pled facts sufficient to demonstrate his right to bring a direct action against Liberty. It may be pertinent to note that this Court previously made a similar determination with regard to ERSIC. (C.D. Cal. No. CV 11-4828, Docket No. 214 [9/12/12 Order] at 11). Just as here, the Court determined (1) that economic loss does not constitute property damage, and (2) that Plaintiff's emotional distress theory of bodily injury did not hold

[4] At Liberty's request, the Court takes judicial notice of this document. Pursuant to Federal Rule of Evidence 201, judicial notice is appropriate for "matters of public record." United States ex rel. Lee v. Corinthian Colls., 655 F.3d 984, 999 (9th Cir. 2011); see also Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006) (court filings are proper subjects of judicial notice); Silicon Valley Bank v. New Hampshire Ins. Co., 203 F. Supp. 2d 1152, 1155 (C.D. Cal. 2002) (taking judicial notice of pleadings filed with a court).

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water. Id. Though no estoppel argument has now been raised, Plaintiff has not persuaded the Court that this action against Liberty should have a different result.

4. Plaintiff's Dependant Claims

Plaintiff apparently admits that two of his claims against Liberty, for breach of the duty of good faith and fair dealing, depend upon his ability to bring a direct action. (Liberty Opp. at 12.) Since he cannot bring a direct action, these claims must likewise fail.

b. Plaintiff's Remaining Claim for Inducement

Plaintiff also has one claim against Liberty that does not depend upon the direct action theory: he indicates that Liberty induced RHD to breach its settlement agreement. (FAC ¶¶ 89–95.) In support of this claim, he suggests "that Liberty, by paying obligations of RHD other than the one to Hyan, and paying Hummer and Peterson . . . were a cause of RHD failing to use its best efforts to secure payment for Hyan." (Liberty Opp. at 17.)

Plaintiff's logic escapes the Court. The elements of an inducement to breach a contract claim are:

> [1] the existence of a valid contract . . . ; [2] that the defendant had knowledge of the existence of the contract and intended to induce a breach thereof . . . ; [3] that the contract was in fact breached resulting in injury to plaintiff . . . [;] and [4] the breach and resulting injury must have been proximately caused by defendant's unjustified or wrongful conduct.

Freed v. Manchester Service, Inc., 331 P.2d 689, 691 (Cal. App. 2d Dist. 1958). The FAC indicates that there was a contract—the settlement agreement—that Liberty knew of the contract, and that RHD breached the contract. But it has nothing to say about the possibility that Liberty "caused" RHD's breach. That is, there is no suggestion that RHD failed to use its best efforts to comply with the settlement agreement simply because Liberty refused to pay Hyan. Indeed, the requirement that RHD use its best efforts to persuade Liberty to pay up implicitly contemplates the possibility that Liberty might refuse. The "best efforts," then, would only be made after Liberty's refusal. Accordingly, refusal in and of itself cannot support the causation prong of this claim.

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c. Disposition of Liberty's Motion

Plaintiff cannot claim a right of direct action against Liberty, and he has not pled sufficient facts to state a claim for inducement. His lone remaining cause of action, for declaratory relief, must therefore fail as well. See Brittain v. IndyMac Bank, FSB, 2009 U.S. Dist. LEXIS 84863, at *15 (N.D. Cal. Sept. 16, 2009) (when a declaratory relief claim merely duplicates other untenable causes of action, it should be dismissed). With each of the claims against it disposed of, Liberty's motion to dismiss must be **GRANTED** in its entirety.

2. HUMMER'S ANTI-SLAPP MOTION

Plaintiff's allegations against Hummer are quite different from the majority of those directed at Liberty. At their root, they stem from the claim that Hummer "direct[ed] a party to an insurance contract not to pay a legitimate claim, while insisting that the carrier deplete the policy due to payments for her benefit." (Docket No. 30 [Opp. to Anti-SLAPP Mot. to Strike ("SLAPP Opp.")] at 2.) Put in less incendiary language, Hummer objected to Liberty paying the $7.5 million settlement amount so that she too could rely upon its coverage.

The insurance policies that could have been used to pay Plaintiff's judgment were never set aside *solely* to satisfy Plaintiff's judgment. If Hummer is covered by the policies, she has every right to make demands on them, even if the result is that payments to Hyan are delayed or diminished. She has therefore brought this anti-SLAPP motion.

As described above, an anti-SLAPP motion can only be granted following an evaluation of the SLAPP statute's two prongs. First, the claims against a defendant must "arise from" an act which was in furtherance of the defendant's right of petition or free speech. Second, a plaintiff must fail to demonstrate that he will probably prevail on the claims at trial. The Court evaluates each of these issues, below.

a. "Arising From" an Act in Furtherance of the Right of Petition/Free Speech

In the first step of an anti-SLAPP inquiry, a defendant "has the burden of making a prima facie showing" that the lawsuit arises from a protected activity under the statute. Dixon, 36 Cal. Rptr. 2d at 694. Among other things, the defendant will prevail if she can show that "the act underlying the plaintiff's cause" is based upon any "statement or writing made in connection with an issue under consideration or review by a . . . judicial body." Cal. Code Civ. Proc § 425.16(e).

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Plaintiff's case here focuses on Hummer's demand that Liberty and ERSIC not "releas[e] funds to . . . Hyan." (FAC ¶ 28.) In itself, this demand is not necessarily "connected" to "an issue under consideration or review by a judicial body." Cal. Code Civ. Proc § 425.16(e). Taking Plaintiff's argument at face value, Hummer's actions have simply interfered with his collection on the judgment against RHD. (FAC ¶ 42.) However, the Court must also consider the origins of Hummer's demand. "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." Navellier, 29 Cal.4th at 92 (emphasis in original).

In their briefing on this motion, the Parties—and especially Hummer—go down a rabbit hole, attempting to connect this case to the litigation privilege afforded by California Civil Code § 47(b). (SLAPP Mem. at 14–19; SLAPP Opp. at 4–11.) Over the course of far too many pages, they debate the connection between this suit and purportedly privileged communications in the actions against Hummer. Though potentially illuminating,[5] this discussion of litigation privilege caselaw is ultimately unnecessary.

Hummer has sought to prevent Liberty and ERSIC from giving the entire proceeds of their policies to Plaintiff, arguing that she is likewise entitled to coverage. Or rather, Hummer has made an insurance claim so that she can pay for her litigation costs. (FAC ¶ 28.) Necessarily attendant upon this claim, given the uncertainty over whether there will be sufficient coverage for everyone making claims, Hummer has asked that Liberty and ERSIC not pay anything to Plaintiff. Any "interference" therefore relates entirely to her attempts to provide a defense to claims—issues—"under consideration" by a "judicial body." See Cal. Code Civ. Proc § 425.16(e).

California courts have recognized that "an insurance claim . . . may constitute protected petitioning activity" under Section 425.16(e). People ex rel. Fire Ins. Exch. v. Anapol, 211 Cal. App. 4th 809, 827 (2012). They have even found that "exhorting others to contribute to the cost of proposed litigation" qualifies for protection under Section 425.16. Thayer v. Kabateck Brown

[5] While the anti-SLAPP statute and the litigation privilege are substantively different statutes that serve different purposes, "the absolute litigation privilege of [Cal. Civ. Code § 47(b)], for 'judicial' or 'official' communications helps define the meaning of protected activity under [Cal. Ins. Code §] 425.16." Trapp v. Naiman, 218 Cal. App. 4th 113, 119 (citing Briggs v. Eden Council for Hope & Opportunity, 19 Cal.4th 1106, 1115–1116 (1999)). "The [litigation] privilege 'is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards.'" Id. at 121 (citing Fremont Reorganizing Corp. v. Faigin, 198 Cal. App. 4th 1153, 1172 (2011)).

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Kellner LLP, 207 Cal. App. 4th 141, 154 (2012) (citing Wilcox v. Superior Court, 27 Cal. App. 4th 809, 821-22 (1994)).

Both Anapol and Thayer dealt with substantially different factual predicates from the case now at bar. In the former, individuals ostensibly filed insurance claims so that they could initiate lawsuits, while in the latter the requested donations were intended to fund prosecution of an action rather than its defense. But the basic principle expressed in these cases remains applicable. Making an insurance claim may be a vital, even necessary, element of a defendant's participation in litigation; when this is so, the claim is made "in connection with an issue under consideration or review by a . . . judicial body." Cal. Code Civ. Proc § 425.16(e); see Gallanis-Politis v. Medina, 152 Cal. App. 4th 600, 610 (2007) (the anti-SLAPP statute protects statements made both in defending and/or prosecuting some underlying litigation).

When it comes down to it, the "*activity* that gives rise to [Hummer's] asserted liability" is an attempt to defend herself against some other litigation. Navellier, 29 Cal.4th at 92. This may have included asking Liberty and ERSIC not to give Hyan any money, and it may have stretched all the way to asking RHD not to pursue the money. Regardless, it was a "statement or writing made in connection with an issue under consideration or review by a . . . judicial body." Cal. Code Civ. Proc § 425.16(e). Hummer has therefore met her prima facie burden, and the Court will therefore evaluate the possibility that Plaintiff may prevail at trial.[6]

b. Prevailing at Trial

If a defendant shows that the claims against her arise from a protected activity, the court undertakes a further inquiry, evaluating whether the plaintiff has demonstrated that she will probably prevail on the claim at trial. Evans, 45 Cal. Rptr. 2d at 627–28. "[I]n order to establish the requisite probability of prevailing, the plaintiff need only have stated and substantiated a legally sufficient claim." Navellier, 29 Cal. 4th at 88 (citations and quotation marks omitted).

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[6] This outcome comports with a "litigation privilege" type analysis—which applies to any communications (1) made in a judicial proceeding; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; (4) that have some connection or logical relation to the action. Silberg v. Anderson, 50 Cal. 3d 205, 212 (1990). Non-litigants possessing a "substantial interest in the outcome of the litigation"—such as Liberty here—are "authorized participants" for purposes of the litigation privilege. Costa v. Superior Court, 157 Cal. App. 3d 673, 678 (1984); see also Adams v. Superior Court, 2 Cal. App. 4th 521, 529 (1992) (noting that "the privilege is not restricted to the parties in the lawsuit but need merely be connected or related to the proceedings"). Communications between Hummer and Liberty concerning insurance coverage could be included under the litigation privilege, if they were properly kept private, based on their connection to the litigation against Hummer. They could therefore also be considered to have some connection to "issue[s] under consideration or review by a judicial body." Cal. Code Civ. Proc § 425.16(e).

Plaintiff brings two claims against Hummer. Both are for inducement to breach a contract: (1) inducing Liberty to not pay Plaintiff; and (2) inducing RHD to not use its best efforts in obtaining payment for Plaintiff. (FAC ¶¶ 66–77, 96–107.) As described above, the elements of an inducement to breach contract claim are:

> [1] the existence of a valid contract . . . ; [2] that the defendant had knowledge of the existence of the contract and intended to induce a breach thereof . . . ; [3] that the contract was in fact breached resulting in injury to plaintiff . . . [;] and [4] the breach and resulting injury must have been proximately caused by defendant's unjustified or wrongful conduct.

Freed, 331 P.2d at 691.

Plaintiff has failed to allege the existence of any valid contract between himself and Liberty. The Court is therefore unclear what standing Plaintiff has to sue anyone for inducing Liberty to breach a contract. See Collins v. Vickter Manor, Inc., 47 Cal. 2d 875, 883 (1957) ("one who, without legal justification, intentionally induces a third person not to perform a contract *with another*, is liable to the other for the ensuing damage") (emphasis added); Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126 (1990) (inducement requires "a valid contract between plaintiff and a third party"). Moreover, as described above, Plaintiff cannot bring even a direct action against Liberty for a breach of its policy agreement with RHD. He cannot sidestep this ban by simply claiming that Hummer induced Liberty to breach the agreement

But most critically, there is no suggestion in Plaintiff's complaint that Hummer interfered with any contract "without legal justification." Collins, 47 Cal. 2d at 883. She was sued twice for actions taken during her time of employment with RHD. It is true that these suits both alleged intentional torts, which RHD's policy generally does not cover. (Liberty Opp. at 15; FAC ¶ 29.) However, the policy still requires Liberty to pay defense costs, even when intentional torts have been alleged. (Liberty Policy at 9) (the policy "does not apply: (1) to any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, malicious or deliberately wrongful acts or omissions . . . however, [Liberty] will defend allegations of the foregoing acts or omissions until the time that the act or omission is factually proven.") At least so far, no intentional tort has been "factually proven," and Hummer therefore has a right to demand coverage from Liberty.

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Plaintiff has also failed to establish any probability of prevailing on a claim that Hummer induced RHD to use less than its best efforts to satisfy the $7.5 million judgment. This cause of action apparently relies upon the proposition that requesting insurance coverage from Liberty constitutes "unjustified or wrongful conduct" that could cause RHD to breach its agreement. Freed, 331 P.2d at 691. However, as just described, Hummer was well within her rights to demand insurance coverage. With no further description of "wrongful conduct," Plaintiff would be unable to succeed against Hummer at trial. Evans, 45 Cal. Rptr. 2d at 627–28.

It cannot be said that Hummer has induced any breach of contract when she requested coverage to which she was entitled. Ultimately, Plaintiff's problems stem instead from the fact that RHD did not obtain enough insurance coverage. Because she has met both prongs of the anti-SLAPP statute, Hummer's motion to strike must be **GRANTED**. Trapp, 218 Cal. App. 4th at 119 ("[o]nly causes of action that . . . [both] arise from protected speech or petitioning activity and that lack even minimal merit, are subject to being stricken") (citation omitted).

3. HUMMER'S MOTION TO DISMISS

Because the Court has already stricken the claims against Hummer, her motion to dismiss is moot. It will therefore be **DENIED**.

IV.
CONCLUSION

For the foregoing reasons, Liberty's motion to dismiss is **GRANTED**. However, Plaintiff shall be permitted **leave to amend**, so that he may have the opportunity to more fully allege a theory of inducement. Any amendment must be filed no later than Monday, July 7, 2014. Hummer's anti-SLAPP motion is also **GRANTED**, but her motion to dismiss is **DENIED as moot**. The hearing previously scheduled for Monday, June 23, 2014, is hereby **VACATED**.

IT IS SO ORDERED.